SUBJECT INDEX

Page

I.

The pertinent provisions of the Kentucky Revised Statutes, on their face and as construed and applied to eliminate a defense of good-faith belief that publications are not obscene, abridge freedoms of speech and press and arbitrarily deprive the accused of liberty without due process of law, contrary to the provisions of the First and Fourteenth Amendments 2

II.

The pertinent provisions of the Kentucky Revised Statutes, on their face and as construed and applied to exclude evidence, both oral and documentary, showing that an accused in an obscenity prosecution had no knowledge of the contents or of the alleged obscenity of the publications, abridge freedoms of speech and press and arbitrarily deprive the accused of liberty without due process of law, contrary to the provisions of the First and Fourteenth Amendments 5

Conclusion 6

TABLE OF AUTHORITIES CITED

Cases	Page
Commonwealth v. Moniz, 338 Mass. 442, 155 N.E. 2d 762	3
Connecticut v. Martin, et al., 26 Conn. Super. Ct. 84, 213 A. 2d 459	3
Excellent Publications, Inc. v. United States, 309 F. 2d 362	3
Excelsior Picture Corp., Matter of v. Regents, 3 N.Y. 2d 237, 143 N.E. 2d 31	3
Fanfare Films, Inc. v. Motion Picture Censor Board v. Maryland, 234 Md. 10, 197 A. 2d 839	3
Haigler v. United States, 172 F. 2d 986	5
Humor Magazine, Inc. v. United States, 311 F. 2d 576	3
Larkin v. G. I. Distributors, 14 N.Y. 2d 869, 252 N.Y.S. 2d 81, 200 N.E. 2d 768	3
LeBaron v. Olesen, 125 Fed. Supp. 53	3
Lerner, State of, 51 Ohio L. Abs. 321, 81 N.E. 2d 282	3
Louisiana News Co., In re v. Dayries, 187 Fed. Supp. 241	3
Manual Enterprises, Inc. v. Day, 370 U.S. 478	3
Mounce v. United States, 355 U.S. 180	3
Norcott v. United States, 65 F. 2d 913	5
Parmelee v. United States, 133 F. 2d 729	3
People v. Richmond County News, 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681	3
Smith v. California, 361 U.S. 147	4, 5, 6
State v. Locks, 97 Ariz. 148, 397 P. 2d 949	3
Sunshine Book Co. v. Summerfield, 355 U.S. 372	3
United States v. Matot, 146 F. 2d 197	4

Statutes Page

Kentucky Revised Statutes, Sec. 436.100 1
Kentucky Revised Statutes, Sec. 436.100(2) 1
Kentucky Revised Statutes, Sec. 436.100(4) 1
United States Code, Title 39, Sec. 4355 5
United States Constitution, First Amendment 2
United States Constitution, Fourteenth Amendment 2

IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

PETITIONER'S REPLY BRIEF.

The statute here under consideration [KRS 436.100] was repealed, and a new obscenity statute enacted, as of June 11, 1966. The new statute provides in relevant part: "Any person who, having knowledge of the obscenity thereof . . . has in his possession with intent to distribute . . . any obscene matter is punishable by fine . . . or, imprisonment. . . ." [New KRS 436.100(2)]. At the same time, the Legislature eliminated the section of the old law [KRS 436.100(4)], providing that the sale of any book or magazine found to be obscene shall be *prima facie* evidence that the seller had knowledge of the obscene character of the material.

It thus appears that in Kentucky today no person can be held criminally liable unless the State shoulders the entire burden of proving beyond a reasonable doubt that the accused had knowledge of the obscenity of the challenged work.

This reply brief is addressed solely to Points II and III of Respondent's Brief. Petitioner is content to rely on his brief (Pet. Br. 42-46) in answer to Point I of Respondent's Brief.

I.

The Pertinent Provisions of the Kentucky Revised Statutes, on Their Face and as Construed and Applied to Eliminate a Defense of Good-Faith Belief That Publications Are Not Obscene, Abridge Freedoms of Speech and Press and Arbitrarily Deprive the Accused of Liberty Without Due Process of Law, Contrary to the Provisions of the First and Fourteenth Amendments.

(a) Respondent first argues that petitioner could not have had an honest belief that the magazines were not obscene and, hence, petitioner's defense on this ground was properly not submitted to the jury (Resp. Br. 13). Respondent's argument, on this point, reduces itself to the proposition that *all* "girlie" magazines, *i.e.*, magazines containing photographs of nudes, are obscene, and that all persons who sell such a magazine, knowing it to contain photographs of nudes, are conclusively presumed to know the magazine is obscene (Resp. Br. 12-13).

The overwhelming weight of authority however establishes that mere nudity, whether found in "girlie" magazines or elsewhere, is not obscenity. In *Manual Enter-*

prises, Inc. v. Day, 370 U.S. 478, 489-490, Mr. Justice Harlan said of magazines portraying male nudes:

> "Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene.' . . . . [T]he portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course, not every portrayal of male or female nudity is obscene."

See, *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; *Mounce v. United States,* 355 U.S. 180; *Parmelee v. United States,* 133 F. 2d 729 (C.A. D.C. 1940); *Excellent Publications, Inc. v. United States,* 309 F. 2d 362 (1 Cir. 1962); *Humor Magazine, Inc. v. United States,* 311 F. 2d 576 (1 Cir. 1963); *In re Louisiana News Co. v. Dayries,* 187 Fed. Supp. 241 (D.C. La. 1960); *LeBaron v. Olesen,* 125 Fed. Supp. 53 (D.C. S.D. Calif. 1954); *People v. Richmond County News,* 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961); *Larkin v. G. I. Distributors,* 14 N.Y. 2d 869, 252 N.Y.S. 2d 81, 200 N.E. 2d 768 (1964); *Connecticut v. Martin, et al.,* 26 Conn. Super. Ct. 84, 213 A. 2d 459; *Fanfare Films, Inc. v. Motion Picture Censor Board v. Maryland,* 234 Md. 10, 197 A. 2d 839; *Commonwealth v. Moniz,* 338 Mass. 442, 155 N.E. 2d 762 (1959); *Matter of Excelsior Picture Corp. v. Regents,* 3 N.Y. 2d 237, 143 N.E. 2d 31 (1957); *State of Lerner,* 51 Ohio L. Abs. 321, 81 N.E. 2d 282 (1948); *State v. Locks,* 97 Ariz. 148, 397 P. 2d 949 (1964).

It is arbitrary and a denial of due process to make any presumption, much less a conclusive one, that a bookseller knows a magazines is obscene merely because he may know it contains portrayals of nudity. The portrayal of sex and nudity is not, of course, outlawed by the obscenity laws, and a bookseller cannot be made criminally responsible for distributing a publication which a jury may find obscene when all the bookseller knows about the work is that it deals with these important and popular subjects. If those who circulate the press are to be so stripped of legal protection, they will necessarily be forced to bow to pressure groups and refuse to circulate whatever books or magazines find disfavor with those who patrol the newsstands. The bookseller's timidty in the face of his fear of criminal conviction "would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Smith v. California,* 361 U.S. 147, 154.

(b) Respondent next argues that the trial court properly withheld from the jury the issue of petitioner's good-faith belief in the nonobscenity of the magazines, because petitioner did not claim that he had read the magazines prior to the date of his arrest (Resp. Br. 14).

It is plainly not the law that a bookseller must testify against himself, *i.e.,* that he read and knew the contents of the challenged work, before he can show that he had an honest belief that the publications were not obscene. See, *United States v. Matot,* 146 F. 2d 197,

198 (2 Cir. 1944); *Haigler v. United States,* 172 F. 2d 986, 988 (10 Cir. 1949); *Norcott v. United States,* 65 F. 2d 913, 919 (7 Cir. 1933). To rule otherwise would require the overruling of *Smith v. California.*

II.

The Pertinent Provisions of the Kentucky Revised Statutes, on Their Face and as Construed and Applied to Exclude Evidence, Both Oral and Documentary, Showing That an Accused in an Obscenity Prosecution Had No Knowledge of the Contents or of the Alleged Obscenity of the Publications, Abridge Freedoms of Speech and Press and Arbitrarily Deprive the Accused of Liberty Without Due Process of Law, Contrary to the Provisions of the First and Fourteenth Amendments.

Petitioner sought in vain to prove that he believed the magazines in question were not obscene. Petitioner attempted to show that he could not have examined all of the thousands of publications he handled [R. 50]; that for many years he had openly and freely sold "girlie" magaine, such as "Playboy",[1] "Rogue", "Cavalier", and many others, without complaint [R. 37] in the States of Tennessee, Kentucky, Missouri and Illinois [R. 27, 49]; that he limited the "girlie" magazines he handled to those which he believed enjoyed second-class mailing privileges granted by the Post Office Department [R. 31, 33-34, 49-50];[2] that

---

[1]Petitioner testified that he regularly read "Playboy" and considered "Spree" and "High Heels" "practically the same kind" [R. 43].

[2]No obscene magazine may obtain second-class mailing privileges. 39 U.S.C. 4355.

this Court had found that nudist magazines, revealing more of the human body than the magazines in this case, were not obscene [R. 62]; and that the Paducah Public Library had books containing nudes as revealing as those contained in the magazines herein [R. 63-64].

Petitioner's excluded evidence concerning the wide and open sale of "girlie" magazines containing second-class mailing privileges and the general availability of nude photographs, including the presence of books with such photographs in the Paducah Public Library, tended to showed that magazines containing nudity are generally tolerated by society and are within customary limits of candor. This evidence was relevant to show that petitioner honestly believed the magazines at bar were not obscene. The trial judge rejected this evidence totally. "This had the effect of depriving [petitioner] of the opportunity to offer any proof on a constitutionally relevant issue." Mr. Justice Harlan concurring in *Smith v. California*, 361 U.S. at 172.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN and
CHARLES A. WILLIAMS,
Of Counsel.